

**Sabah Shell Petroleum Co Ltd & Anor v The Owners of and/or
any other Person Interested in the Ship or Vessel the ‘Borcos
Takdir’**

HIGH COURT (KOTA KINABALU) — ADMIRALTY ACTION IN REM
NO D3–27–18 OF 2006
NALLINI PATHMANATHAN J
7 OCTOBER 2011

*Shipping and Navigation — Admiralty — Jurisdiction — Action in rem —
Damage to plaintiffs’ pipeline by defendant’s vessel — Security by way of letter of
undertaking — Quantum of security — Application to increase security —
Whether court has express admiralty jurisdiction to intervene — Whether court had
inherent admiralty jurisdiction to vary terms of letter of undertaking — Whether
there was consensual private arrangement between parties*

On 29 July 2004, the vessel known as the Borcos Takdir (‘the vessel’) damaged the plaintiffs’ underwater pipeline located at St Joseph’s oil field. The plaintiffs claimed that the damage to their pipeline accorded them the right, inter alia, to arrest the vessel if sufficient security were not provided in respect of their claim. Pursuant to negotiations undertaken between the plaintiffs and the owners of the vessel (‘the defendant’), the defendant provided security in the sum of USD10m for the plaintiffs’ claim by way of a letter of undertaking by the P&I Club on behalf of the defendant. The plaintiffs alleged that at the time when the security was provided they had not begun any repair works of the damaged pipeline and thus were not in a position to ascertain the extent of the loss suffered. According to the plaintiffs, it was only in the course of undertaking such repairs that it became apparent that the repair costs far exceeded the amount of security provided by the defendant. The plaintiffs thus commenced the present action for an order for the increase in the security provided by the defendant. By way of this action, the plaintiffs sought the intervention of this court in the exercise of its inherent supervisory admiralty jurisdiction to vary the terms of the letter of undertaking so as to achieve fairness, namely by ordering an increase in the quantum of security to be provided to USD24m. It was the plaintiffs’ case that this court had the power to decide not only the quantum of security but also the form and wording to be used in the security document. The plaintiffs submitted that the admiralty court, which had the power to order the arrest and release of vessels, retained the residual power to ensure that the security provided was fair and reasonable and not oppressive. The defendant objected to the plaintiffs’ application and contended that this court lacked the jurisdiction to grant the interlocutory orders sought by the plaintiffs. The defendant submitted that the orders sought by the plaintiffs did not fall within the express statutory admiralty jurisdiction of this court. The

- A defendant further submitted that this court's inherent admiralty jurisdiction was limited to preventing any oppressive act by the plaintiffs of their right to arrest and that in the absence of oppressive conduct by the plaintiffs the court had no inherent jurisdiction to intervene and vary the security provided. The defendant also contended that the letter of undertaking in this case was a contract between the plaintiffs and the P&I Club and that this court had no jurisdiction to substitute a separate contract for that achieved by consensus between the parties.
- B

Held, dismissing the plaintiffs' application with costs:

- C (1) In the present case, the court could not invoke express admiralty jurisdiction to intervene and declare invalid or inadequate the security afforded by the defendant, because the parties had gone into a consensual private arrangement between themselves where the defendant had given directly to the plaintiffs by way of undertaking an indemnity from a P&I Club. This was not a situation relating to a bail bond where the court could intervene in appropriate circumstances as borne out by case law. Since the plaintiffs had agreed to the quantum of security in 2004, they could not now seek to have that sum varied upwards without the consent or agreement of the defendant and the third party providing such indemnity (see paras 21).
- D
- E (2) The power of the court to control and thereby vary the security arose from its inherent jurisdiction to prevent any abuse of the process of the court or the use of court procedure in an oppressive way. In the present case, there was no such abusive or oppressive conduct. The facts showed that the plaintiffs and the defendant arrived at an agreed sum and that the plaintiffs had in their possession the ability to ascertain with reasonable precision the quantum and costs of the loss and damage they claimed to have suffered. The fact that the plaintiffs had now found that sum to be less than adequate did not in itself warrant interference by this court in the purported exercise of its inherent admiralty jurisdiction as no abuse or oppression had been shown. In these circumstances the court lacked the jurisdiction to intervene and grant the prayers sought by the plaintiffs (see paras 17 & 31).
- F
- G

H **[Bahasa Malaysia summary]**

- I Pada 29 Julai 2004, kapal yang dikenali sebagai Borcos Takdir ('kapal') merosakkan saluran paip dalam air plaintif-plaintif yang terletak di kawasan minyak St Joseph. Plaintif-plaintif menuntut bahawa ganti rugi kepada saluran paip mereka memberikan mereka hak, antara lain, untuk menahan kapal tersebut jika sekuriti yang memadai tidak diberikan berkaitan tuntutan mereka. Berikutan perundingan-perundingan yang dibuat oleh plaintif-plaintif dan pemilik-pemilik kapal ('defendan'), defendan memperuntukkan sekuriti dalam jumlah USD10 juta untuk tuntutan

plaintif-plaintif melalui surat akujanji oleh Kelab P&I bagi pihak defendan. Plaintiff-plaintif mendakwa bahawa pada masa sekuriti diperuntukkan mereka belum memulakan apa-apa kerja-kerja pembaikan terhadap saluran air yang rosak tersebut dan oleh itu tidak berada dalam kedudukan untuk memastikan kerugian yang dialami. Menurut plaintiff-plaintif, hanya semasa dalam menjalankan pembaikan-pembaikan tersebut yang ia menjadi jelas bahawa kos pembaikan jauh melebihi jumlah sekuriti yang diperuntukkan oleh defendan. Plaintiff-plaintif oleh itu memulakan tindakan ini untuk perintah peningkatan dalam sekuriti yang diperuntukkan oleh defendan. Melalui tindakan ini, plaintiff-plaintif memohon campur tangan mahkamah ini dalam menjalankan bidang kuasa admiralti pengawasan sedia ada untuk mempelbagaikan terma-terma surat akujanji untuk mencapai keadilan, terutamanya dengan mengarah peningkatan dalam kuantum sekuriti yang diperuntukkan kepada USD24 juta. Ia adalah kes plaintiff-plaintif bahawa mahkamah ini mempunyai kuasa untuk memutuskan bukan saja kuantum sekuriti tetapi juga bentuk dan perkataan yang akan digunakan di dalam dokumen sekuriti. Plaintiff-plaintif berhujah bahawa mahkamah admiralti, yang mempunyai kuasa untuk mengarah penangkapan dan pelepasan kapal-kapal, mengekalkan baki kuasa untuk memastikan bahawa sekuriti yang diperuntukkan adalah adil dan munasabah dan tidak menindas. Defendan membantah permohonan plaintiff-plaintif dan berhujah bahawa mahkamah ini tidak mempunyai bidang kuasa untuk memberikan perintah-perintah interlokotari yang dipohon oleh plaintiff-plaintif. Defendan berhujah bahawa perintah-perintah yang dipohon oleh plaintiff-plaintif tidak terangkum di dalam bidang kuasa admiralti statutori nyata mahkamah ini. Defendan selanjutnya berhujah bahawa bidang kuasa admiralti sedia ada mahkamah ini adalah terhad untuk menghalang apa-apa tindakan menindas oleh plaintiff-plaintif atas hak mereka untuk menangkap dan dalam ketiadaan tindakan menindas oleh plaintiff-plaintif, mahkamah tidak mempunyai bidang kuasa sedia ada untuk campur tangan dan mempelbagai sekuriti yang diperuntukkan. Defendan juga berhujah bahawa surat akujanji dalam kes ini adalah kontrak di antara plaintiff-plaintif dan Kelab P&I dan bahawa mahkamah ini tidak mempunyai bidang kuasa untuk menggantikan kontrak berasingan untuk mencapai pendapat persetujuan di antara pihak-pihak.

Diputuskan, menolak permohonan plaintiff-plaintif dengan kos:

- (1) Dalam kes ini, mahkamah tidak dapat membangkitkan bidang kuasa admiralti nyata untuk campur tangan dan mengisytiharkan sekuriti yang diberi oleh defendan sebagai tidak sah atau tidak mencukupi, kerana pihak-pihak telah memasuki perjanjian sulit antara mereka di mana defendan telah memberi terus kepada plaintiff-plaintif melalui akujanji indemniti daripada Kelab P&I. Ini bukan keadaan berkaitan untuk ikat jamin di mana mahkamah boleh campur tangan dalam keadaan yang wajar seperti yang ditetapkan oleh undang-undang kes. Memandangkan

- A plaintif-plaintif bersetuju dengan kuantum sekuriti pada 2004, ia
sekarang tidak dapat memohon jumlah tersebut bagi peningkatan tanpa
izin atau persetujuan defendan dan pihak ketiga yang memperuntukkan
indemniti tersebut (lihat perenggan 21).
- B (2) Kuasa mahkamah untuk mengawal dan oleh itu untuk mempelbagaikan
sekuriti berbangkit daripada bidang kuasa sedia adanya untuk
menghalang apa-apa penyalahgunaan proses mahkamah atau
penggunaan prosedur mahkamah dalam cara menindas. Dalam kes ini,
tidak terdapat tindakan salahguna atau menindas. Fakta menunjukkan
bahawa plaintif-plaintif dan defendan mencapai jumlah yang
dipersetujui dan bahawa plaintif-plaintif mempunyai dalam milikan
mereka keupayaan untuk memastikan dengan ketepatan munasabah
kuantum dan kos kerugian dan ganti rugi yang mereka dakwa telah
alami. Fakta bahawa plaintif-plaintif telah mendapati bahawa jumlah
adalah kurang daripada jumlah yang mencukupi tidak dengan sendirinya
mewajarkan campur tangan mahkamah ini dalam pelaksanaan bidang
kuasa admiralti inheren memandangkan penyalahgunaan atau
penindasan tidak ditunjukkan. Dalam keadaan ini, mahkamah tidak
mempunyai bidang kuasa untuk campur tangan dan memberikan
permohonan-permohonan yang dipohon oleh plaintif-plaintif (lihat
perenggan 17 & 31).]

Notes:

- F For cases on admiralty jurisdiction, see 11 *Mallal's Digest* (4th Ed, 2011
Reissue) paras 1213–1249.

Cases referred to

- G *'Arcadia Spirit', The; Esso Singapore Pte Ltd v 'Arcadia Spirit' (Owners of)* [1988]
3 MLJ 263 (refd)
Alacrity The [1994] 2 HKC 659, HC (refd)
Alleta The [1974] 1 Lloyd's Rep 40 (refd)
'Benja Bhum', The [1994] 1 SLR 88 (refd)
- H *'Clarabelle' The* [2002] 2 Lloyd's Rep 479, CA (refd)
'Inai Selasih' (Ex 'Geopotes X') The [2005] 4 SLR 1, HC (refd)
Moschanthy The [1971] 1 Lloyd's Rep 37 (refd)
Piya Bhum, The [1994] 1 SLR 564, HC (refd)
- I *'Polo II' The* [1977] 2 Lloyd's Rep 115 (refd)
Sadit Timber Sdn Bhd & Anor v The 'Ling Yung' And 'Thai Yung', Owners & Ors
[1984] 2 MLJ 218 (foll)
'The Andria' [1984] 1 All ER 1126 (refd)
'The Wladyslaw Lokietek' [1978] 2 Lloyd's Rep 520, QB (refd)

Legislation referred to

Courts of Judicature Act 1964 s 24(b)

Merchant Shipping (Liability of Shipowners and Others) Act 1958 [UK] s 5

Rules of the High Court 1980 O 70 r 15(1), Form 164

Supreme Court Act 1981 ss 20(2), 21(2), (4)

*Liew Teck Huat (Lim Qi Si with him) (TH Liew & Partners) for the plaintiffs.
Arun Krishnalingam (Matthew Kurien with him) (Sativale Mathew Arun) for the
defendant.*

Nallini Pathmanathan J:

[1] This is an application by the plaintiffs for a review of the security provided by the defendant in respect of its claim. In essence the plaintiff seeks an order from this court for the security provided to be increased. The defendant objects to any such increase in the provision of security. The precise prayers sought by the plaintiff are that:

- (a) this court declare that the security of USD10m provided by the defendant by way of a letter of undertaking be declared inadequate and that security be increased to USD24m or such other reasonable amount deemed fit by the court;
- (b) that is court declare that the wording of the letter of undertaking dated 11 October 2004 provided by The Shipowners Protection Ltd issued to the plaintiffs on behalf of the defendant in lieu of arrest is inappropriate and that this court moderate or vary or modify such terms as it deems fit.

SALIENT FACTS

[2] The background facts are comprehensively set out in the plaintiffs' submissions and I adopt the same. On 29 July 2004, a six inch underwater pipeline which is part of the plaintiffs' offshore production platform known as SJJTH located at St Joseph's oil field sustained damage when it was snagged and ruptured in the course of the Borcos Takdir retrieving anchor.

[3] The damage to the pipeline came within the admiralty jurisdiction of this court and accorded the plaintiffs the right, inter alia, to arrest the vessel if sufficient security were not provided in respect of the claim. Pursuant to the plaintiffs' negotiations undertaken between one Captain Tiong on behalf of the plaintiffs and the defendant's solicitors, security was provided on behalf of the defendant by way of a club letter of undertaking in the sum of USD 10m. Such security was provided in October 2004, some two months after the incident. The plaintiffs contend that at the time the repair works necessitated had not even begun. As such the plaintiffs maintain that it was not in a position to

- A ascertain the extent of the loss suffered. The repair works were mobilised in November 2004, stopped due to the onset of bad weather and continued again in February 2005 until completion.
- B [4] The plaintiffs maintains that it was only in the course of undertaking such repairs that the full extent of the costs incurred became apparent. And this sum far exceeded the amount of security provided by the defendant, even without the inclusion of interest and costs.
- C [5] The trial of this matter is complete and in its course, considerable evidence was tendered on the costs of repair. This element alone, based on the evidence of one Mr Sim Theng Hioh exceeds USD 15m. The plaintiffs contend therefore that the security furnished does not reflect the reasonably best plaintiffs' arguable case and seeks the intervention of this court to effect an increase in the quantum of security afforded to it.
- D

THE PLAINTIFFS' CASE

- E [6] In support of its application, the plaintiffs point out that this court in the exercise of its admiralty jurisdiction retains an overriding power to supervise and ensure that security provided is adequate and fair to both parties. It has the power, the plaintiffs contends to decide not only the quantum of security but also the form and wording to be used in the security document. The admiralty court which has the power to order the arrest and release of vessels retains the residual power to ensure that security provided is fair and reasonable and not oppressive or overreaching either way. Such jurisdiction it is contended is not merely statutory but inherent (see *'The Vasso'* where the English Court of Appeal held, inter alia:
- F
- G ... In our judgment the purpose of the plaintiff in invoking the admiralty jurisdiction cannot affect the existence of the jurisdiction. The jurisdiction is simply there. The court has the power to arrest. But the exercise of the power is, as O 75, r 5(1) shows, not mandatory; the court may decline to exercise it. Further more under 13(4) of O 75 the court has a discretionary power to order the release of property under arrest.
- H
- I [7] The plaintiffs then traced the basis for the provision of security in lieu of the arrest of a vessel, making reference to the provision of security in accordance with the Rules of the High Court, payment into court or providing security on terms acceptable to the arresting party, the plaintiff. Order 70 provides for the provision of security in the form of a bail bond as set out in Form 164 under O 70 r 15(1) of the Rules of the High Court 1980. The plaintiffs submitted that the most common objection in relation to bail bonds is the quantum or the upper limit of the same, whereby rules were adopted to fix the quantum of the

security. In *The Moschanty* [1971] 1 Lloyd's Rep 37 the court held that the plaintiff is entitled to security based on its reasonably arguable best case. The plaintiff maintains that if the court had no jurisdiction to intervene in relation to the issue of the quantum of security provided, these rules could not have developed.

A

B

[8] The plaintiffs also rely on the case of '*The Piya Bhum*' [1994] 1 SLR 564 where the defendant procured a bail bond from a Swedish P&I Club. The plaintiff sought to have the bail bond set aside. The plaintiff failed at first instance but on appeal the Singapore Court of Appeal held as follows:

C

... the owners of a ship may secure the release of their ship, if under arrest, or the restraint of her arrest, by providing a bail bond for an adequate amount in Form 164. The court has jurisdiction to decide on the quantum of the bond. The court also has jurisdiction to vary the wording of the guarantee to protect the legitimate rights of the defendants: *The Bulgaria*. The court of course, cannot validate a worthless bail bond.

D

[9] The court drew a distinction between a bail bond and a guarantee.

E

[10] The plaintiffs also relies on the case of '*The Bulgaria*' where the defendant wished to modify the terms of the prescribed form of security on the exceptional circumstances that the ship belonged to a foreign state which declined to submit to jurisdiction. The court allowed the qualifying words to be added to the form but only on being satisfied that the plaintiff would not be prejudiced.

F

[11] The plaintiffs then move on to consider payment into court and the provision of alternative security such as a banker's guarantee or a letter of undertaking which is commonly afforded these days as a sensible and efficacious mode of resolving security disputes in this area of the law. The plaintiffs contend that if the court has a discretion to intervene where bail bonds are concerned but cannot do so in matters relating to other forms of security then this would be entirely absurd, resulting in parties insisting on bail bonds rather than alternative security. The plaintiffs maintain that the court has the absolute discretion to settle the quantum and terms of alternative security between the parties (see *The 'Benja Bhum'* [1994] 1 SLR 88). In *The 'Arcadia Spirit'; Esso Singapore Pte Ltd v 'Arcadia Spirit' (Owners of)* [1988] 3 MLJ 263, the court of first instances ordered the release of the defendants' vessel from arrest on providing security for NZ\$7.5m from the Britannia Steam Ship insurance Association Ltd. One of the terms of the order was that the wording of the guarantee was to be in terms settled by the registrar. The New Zealand Court of Appeal held:

G

H

I

A ... there was no error in the judge's approach. In our view he exercised his discretion in accordance with the intention and spirit of the rule, nor has there been shown to be any principle of admiralty law which his decision could be said to be in conflict.

B [12] This decision was accepted in the *The 'Arcadia Spirit'; Esso Singapore Pte Ltd v 'Arcadia Spirit' (Owners of)* [1988] 3 MLJ 262. And in the Singapore High Court decision in *The 'Inai Selasih' (Ex 'Geopotes X')* [2005] 4 SLR 1, the plaintiffs arrested the vessel and refused to release it on provision of reasonable security, demanding instead extortionate sums of monies. The Malaysian owners of the vessel sought the intervention of the Singapore High Court asking it to exercise its supervisory jurisdiction. The court intervened and ordered the release of the vessel on the provision of security in a considerably lesser sum than that demanded. The court also settled the wording of the banker's guarantee.

D [13] In like manner therefore in the instant case, the plaintiffs seek the intervention of this court in the exercise of its inherent supervisory admiralty jurisdiction to vary the terms of the letter of undertaking so as to achieve fairness, namely by ordering an increase in the quantum of security to be provided. The plaintiffs rely on, inter alia, the foregoing cases to make the submission that the court has jurisdiction to so increase the quantum of security between the parties.

THE DEFENDANT'S CASE

F [14] The defendant strenuously objects to this application contending, inter alia, that the court lacks jurisdiction to grant the interlocutory orders sought by the plaintiffs. The defendant points first to the admiralty jurisdiction of the High Court as expressly provided by statute, namely s 24(b) of the Courts of Judicature Act 1964 and ss 20(2) and 21(2) and (4) of the Supreme Court Act 1981. In the exercise of this express admiralty jurisdiction the plaintiffs has the right to arrest a vessel as security for a maritime claim if the court has jurisdiction to hear and determine the claim and the requirements of O 70 are complied with. Accordingly the defendant maintains that the orders sought in this application do not fall within the express statutory admiralty jurisdiction of the court.

I [15] With regards to the inherent jurisdiction of the court, the defendant submits that the court does indeed have an inherent jurisdiction to prevent abuse of the admiralty jurisdiction of the court. However such inherent admiralty jurisdiction it is contended, is limited to preventing any oppressive act or use by the plaintiff of his right to arrest, albeit by way of actual arrest or threat of arrest. (*The 'Polo II'* [1977] 2 Lloyd's Rep 115). In *The 'Polo II'* Brandon J who also heard the locus classicus, *'The Moschanthy'* held as follows:

... The nature of the proceedings appears from *The Moschanthy* [1971] 1 Lloyd's Rep 37, where a similar question arose. I took the view in that case that the court had power to control the amount of security demanded by a plaintiff in an action in rem and that the control should be exercised on the principle that a plaintiff was only entitled to demand such an amount as security as would cover his reasonably best arguable case, that is to say cover the amount of the claim, the amount of any interest that might be recoverable and the amount of any costs. And I took the view that the power of the court to control security in that way was derived from the inherent jurisdiction of the court to prevent any abuse of the process of the court, or the use of court procedure in an oppressive way. As I pointed out in that case the power to arrest a ship is a very drastic power. And the power to insist that she shall remain under arrest unless security of a certain amount is given is equally a drastic power, and my view, which I expressed in *The Moschanthy* and which I repeat now, is that that power must not be exercised oppressively, and if it is exercised oppressively then the court can and should interfere to prevent conduct of that kind. At the same time the court must make sure that the plaintiff is not left without sufficient security to cover his reasonably best arguable case ...

A

B

C

D

[16] The defendant therefore maintains that the inherent admiralty jurisdiction of this court serves to protect an abuse by the plaintiffs of their right to arrest and demand security to preclude such arrest, upon proof of such abusive conduct. In determining whether there is abuse or oppressive conduct the rule as set out in *The Moschanthy* is that the plaintiffs are entitled only to its reasonable best arguable case, plus interest and costs. This is a matter for the plaintiff to establish, not the defendant. This is because it is the plaintiffs that are in a position to assess the costs and quantum which forms the basis for the demand for security. The defendant would not be in a position to assess this.

E

F

[17] Consequently the defendant argues that in the absence of abusive or oppressive conduct by the plaintiffs the court has no inherent jurisdiction to intervene and moderate or vary the security provided.

G

THE REARREST

[18] The defendant maintains that the plaintiffs could and should have made a proper assessment of the costs of repair before demanding and agreeing to the sum of USD10m which was duly provided by the defendant. They possessed the requisite information to make the assessment at the material time.

H

[19] As such the defendant maintains that if the plaintiffs needs to increase their security this can only be done by way of rearrest in this case (*The 'Clarabelle'* [2002] 2 Lloyd's Rep 479). This court it is maintained cannot compel the defendant to provide any form of security save in relation to the arrest of a vessel, where the court may impose as a condition to release, the

I

A provision of alternative security. That it is pointed out, is not the case here.

THE LETTER OF UNDERTAKING

B [20] The defendant submits that the letter of undertaking in question was not given after the arrest of any of the defendant's ships. It was a contract between the plaintiffs and a third party, namely the requisite P&I Club. This is distinguishable from a situation where a third party gives a bail bond to the court. As this is a contract between the plaintiffs and a third party, the defendant maintains that the court has no jurisdiction albeit statutory or
C inherent to rewrite or substitute a separate contract for that achieved by consensus between the parties. In short, their submission is that this court cannot rewrite the contract so as to compel the third party to undertake a greater liability than that it agreed to voluntarily (*Sadit Timber Sdn Bhd & Anor v The 'Ling Yung' And 'Thai Yung', Owners & Ors* [1984] 2 MLJ 218; *The Alleta* [1974] 1 Lloyd's Rep 40; *The Alacrity* [1994] 2 HKC 659).
D

DECISION

E [21] I have considered the written and oral submissions tendered by learned counsel for the plaintiffs and the defendant. This is an instance where the plaintiffs seek in effect to obtain a declaration that the agreed security granted by a third party P&I Club on behalf of the defendant to the plaintiffs to be declared inadequate and for such security to be substituted with a significantly
F larger security by the third party at the behest of the court. Further it is sought that the court moderate or modify the wording of such security which was arrived at consensually by the plaintiffs and the defendant through their respective agents.

G [22] The first issue that arises for consideration is that of jurisdiction. I have outlined the arguments of both the plaintiffs and the defendant above. It appears to this court that it cannot invoke express admiralty jurisdiction so as to intervene and declare invalid or inadequate the security afforded in a situation where parties went into a consensual private arrangement between
H themselves such as the present where the defendant has given directly to the plaintiffs by way of undertaking an indemnity or guarantee from a P&I Club. This is not a situation relating to a bail bond, where the court may intervene in appropriate circumstances as borne out by caselaw.

I [23] As outlined in the Hong Kong decision of *The Alacrity* by Barnett J:
... Historically, the practice of the court was that a defendant could only obtain release of a vessel by way of bail bond. See the *Christianborg* [1885] 10 PD 491. A bail bond was an undertaking to the court and represented the vessel itself. See *The Nied Elwin* [1811] Dods Adm 50. Additionally, a defendant could pay the amount

of security claimed by a plaintiff into court. Since the 19th Century, however, the practice has developed of the parties coming to a private arrangement between themselves, whereby a defendant gives security for a plaintiff's claim direct to a plaintiff by way of undertaking indemnity or guarantee given by a P&I Club or a bank. This practice has grown to the extent that bail is almost unheard of while payment into court is unusual.

A

B

[24] The foregoing reflects the position accurately in the courts in Malaysia today.

C

[25] Barnett J went on to note however that while the court retains a measure of jurisdiction over private security arrangements, notwithstanding statements to the effect that they are nothing to do with the court, this is in limited circumstances, for example the release of a vessel. In *'The Wladyslaw Lokietek'* [1978] 2 Lloyd's Rep 520 Brandon J released a security consisting of a written guarantee given by a third party but that case concerned limitation and s 5 of the Merchant Shipping (Liability of Ship Owners and Others) Act 1958. And in *'The Andria'* [1984] 1 All ER 1126 the Court of Appeal released a letter of undertaking from a P&I Club because the arrest of the ship amounted to an abuse of the court's process.

D

E

[26] In situations where the arrest of a vessel was wrongful or where there was for some reason an abuse, it follows that a court may well discharge a private form of security upon release of the vessel. The entire basis for the provision of the private security was tainted or flawed and therefore discharge or cancellation of such an ineffective instrument is necessary. The jurisdiction of the courts to act in such situations is therefore clear. However it is an entirely different matter for the court to intervene in a consensually agreed private arrangement, at the behest of one party and to rewrite the agreement between the parties. I can only echo the words of Barrett J in *The Alacrity* (above), namely that:

F

G

... It is no function of the court and, as I understand it, it has never been, to write a contract for parties before the court ... An in rem action confers a valuable albeit draconian, right upon a plaintiff. I see no warrant for obliging that plaintiff to take an alternative form of security that he does not find acceptable and for which the party giving the security is not, as in the case of bail, immediately answerable to the court. I decline jurisdiction in the circumstances.

H

[27] In like vein the plaintiffs here having agreed to the quantum of security in 2004, with the requisite knowledge and ability to assess the quantum of damages likely to arise, cannot now seek to have that sum varied upwards without the consent or agreement of the defendant and the third party providing such indemnity.

I

- A [28] I am borne out in reaching the aforesaid conclusion by the case of *Sadit Timber Sdn Bhd v The 'Ling Yung' and 'Thai Yung', Owners & Ors* [1984] 2 MLJ 217 where Chong Yik Liong J had occasion to consider whether the High Court had jurisdiction to substitute a new undertaking for the original undertaking at the request of the defendants in that case. In support of that
- B contention, the defendants in that case relied, as is the case here on *The Moschanthy* (above). The learned judge dismissed the contention stating:

- C ... With respect I do not see how this passage can support the submission that the court has jurisdiction to substitute the new undertaking for the original undertaking. What Brandon J said in that passage, according to my understanding, amounts to this, that is, even if the amount of security in actions in rem has been agreed upon by the parties, the court still has power to vary the amount where the amount is shown to be excessive, and it is certainly far from saying that the court has jurisdiction to vary the agreed method of giving security or to substitute a different kind of undertaking for the undertaking previously agreed by the parties.

- D In *The Alletta*, it was held that the court has no jurisdiction to make an order releasing a security not given to the court and not taking the form of a bail bond under the provisions of RSC O 75, r 16.

- E I am inclined to follow *The Alletta* in my approach to this question. I am of the view that where security in an action in rem is furnished by private agreement, such security can only be varied or substituted by mutual agreement of the parties or with the consent of the party affected by such variation or substitution. In the present case, the security by way of the original undertaking was given to the plaintiffs and not to the court in the form of a bail bond as provided under our Rules of the High Court O 70 r 15 (which is in pari material with the English RSC O 75, r 16) and I
- F fail to see how I have any jurisdiction to make the order sought in this application.

- G [29] I respectfully agree and adopt the reasoning above. As stated by the learned judge and indeed by Brandon J in *The Moschanthy* and *'The Polo II'* (above) (which passage I have reproduced above) the power of the court to control and thereby vary or modify security arises from its inherent jurisdiction to prevent any abuse of the process of the court or the use of court procedure in an oppressive way. As such it is only to stop such abuse or oppressive conduct which may arise, for example where a plaintiff, when exercising the power to
- H arrest seeks to utilise that power oppressively by demanding for extortionate sums of money that the court will step in its inherent admiralty jurisdiction to stop such abuse (as was the case in *'Inai Selasih'* (above)). The court will act to stop such abusive or oppressive conduct.

- I [30] I do not find any such abusive or oppressive conduct arising in the instant case. The facts, which are not in dispute, show that the plaintiffs and the defendant through their respective agents arrived at an agreed sum in 2004. The fact that the plaintiffs were represented by an employee while the defendant was represented by solicitors makes no difference. This is because at

the time the plaintiffs had in its possession the ability to ascertain with reasonable precision the quantum and costs of the loss and damage it claimed to have suffered. The defendant did not possess that information.

[31] The plaintiffs have now found that sum to be less than adequate. That in itself does not warrant interference by this court in the purported exercise of its inherent admiralty jurisdiction. This is because no abuse or oppression has been shown, which I accept to be the basis on which the court can, in a suitable case, intervene as explained above. This court cannot rewrite or substitute the private third party security arrangement reached between the plaintiffs and the P&I Club on behalf of the defendant.

[32] In these circumstances I incline to the view that the court lacks jurisdiction to intervene in this matter and grant the prayers sought. Accordingly the plaintiffs' application is dismissed with costs.

Plaintiffs' application dismissed with costs.

Reported by Kohila Nesan

A

B

C

D

E

F

G

H

I